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NO. 83-1927

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WALTER LEE EVANS, ET AL.,
Petitioners,

v.

STATE OF GEORGIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTION PRESENTED

Did the trial court properly deny the motion to suppress and did the Supreme Court of Georgia properly conclude that the wiretaps utilized in the instant case did not exceed the jurisdiction or authority of the Fulton County District Attorney?

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PART ONE

STATEMENT OF THE CASE

Petitioners were indicted along with other individuals by the grand

jury of Fulton County. Petitioners were charged with Violation of the Georgia Racketeer Influenced and Corrupt Organizations Act and entered pleas of not guilty. The trial was held in the Superior Court of Fulton County beginning on October 7, 1982. Petitioners Walter Lee Evans, William Victor Evans and Kenneth H. Adams were found guilty as charged. Petitioner R. K. Sellers was found guilty of commercial gambling.

The instant cases are companion cases to Waller v. State, 251 Ga. 124, 303 S.E.2d 437 (1983), reversed and remanded by this Court for a new suppression hearing on May 21, 1984. Although the issues presented are not the same, the defendants in both cases were involved in the same criminal

enterprise. In general, the facts indicate that numerous individuals, including the Petitioners in the instant case and those in Waller, supra, were involved in a lottery ring which involved gambling on the volume of stocks and bonds traded on the New York Stock Exchange. This information was transmitted by telephone and telecopier and stored in a microcomputer.

The evidence in the instant case showed that Petitioner Walter Lee Evans provided the telecopiers to two lottery stations which were transmitting lottery information to Petitioner Kenneth H. Adams. Petitioners Adams, Victor Evans and R. K. Sellers were scheduled by Walter Lee Evans to contact various persons

to receive bets. (T. 757-759, 771-795). The evidence further showed that Walter Lee Evans ran his own lottery bank and provided a reinsurance service to other lottery bankers who wished to limit their losses.

Walter Lee Evans, through the other codefendants, contacted various lottery bankers and received "layoff" bets. W. B. Burke testified that the lottery which he and Guy Waller banked would write between $5000 to $6000 worth of lottery bets each day. Of that total, Burke and Waller would be responsible for winners on most bets. As to those numbers on which the bank could suffer a significant loss, Burke and Waller were insured by the Evans organization by the process of layoff bets to that organization.

Much of the evidence utilized at trial was obtained pursuant to twelve surveillance warrants issued by a Fulton County Superior Court judge upon application by the district attorney of Fulton County. A motion to suppress was held prior to trial, after which time the trial court concluded that the evidence could be admitted.

After the conclusion of the trial, the instant Petitioners filed a notice of appeal in the Supreme Court of Georgia. That court affirmed the convictions and sentences. Evans v. State, 252 Ga. 312, ___ S.E.2d ___ (1984). A motion for rehearing was denied on March 28, 1984.

Petitioners have now filed the instant petition for a writ of

certiorari challenging the decision by the Supreme Court of Georgia.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. THE TRIAL COURT PROPERLY DENIED THE MOTION TO SUPPRESS AND THE SUPREME COURT OF GEORGIA PROPERLY CONCLUDED THAT THE DISTRICT ATTORNEY AND SUPERIOR COURT JUDGE WERE AUTHORIZED TO APPLY FOR AND ISSUE THE SURVEILLANCE WARRANTS IN QUESTION.

The issue presented in the instant case challenges only the authority and jurisdiction of the district attorney and the superior court judge of the Atlanta Judicial Circuit to apply for and issue certain of the electronic surveillance warrants issued in the instant case. In particular, Petitioners challenge the issuance of the warrants authorizing surveillance where the telephones in question were located outside of Fulton County,

i.e., the Atlanta Judicial Circuit. Respondent submits that the Supreme Court of Georgia properly concluded that the surveillance warrants were within the authority and jurisdiction of the court and the district attorney.

In addressing the issue presented in the instant case, the Supreme Court of Georgia set forth the following facts to describe the equipment used for the surveillance in question:

> The Fulton district attorney's surveillance team worked out of a rented motel room near the intersection of Sylvan Road and Interstate 85, in Hapeville, Fulton County (the "listening post"). The initial step in the installation of each of

the wiretaps was to present the court order authorizing the wiretap to the telephone company, which then selected an "appearance point" and informed the investigations of its location. An "appearance point" was a site, located at some point between the telephone to be tapped and the telephone company's central switching office servicing it, where the line to be tapped, also known as the "subscriber line," converged with another telephone line running to the central switching office, with the latter line being leased to the district

attorney (the "leased line"). All the appearance points assigned for the surveillances involved in this case were located in neighborhood junction boxes, also known as terminal boxes, which (for purposes of this appeal) were located in the same county as the telephone to be tapped.

* * *

To forestall detection, an inductor coil/jumper wire, placed in the neighborhood terminal box, and a control unit, located at the listening post, were used.

Evans v. State, supra, 252 Ga. at 313-314).

The state presented the testimony of Sergeant John Woodard who testified that he installed the surveillance equipment used in the instant case. An inductor coil, known as "101-A" was placed in the telephone junction box which was located at or near the subject telephone. This inductor coil is a piece of equipment consisting of two magnetic coils and four lead wires. One cable pair from the coil was attached to a binding post assigned to the subject lines and a second cable pair was connected to the telephone line leased to the police officers. This piece of equipment prevented voltage loss and inadvertent intrusion. The evidence specifically revealed that this piece of equipment alone would not permit interception of

a telephone call. (T. 40). This piece of equipment is an integral part of a set of equipment and without this piece of equipment or a substitute piece of equipment, interception would not be possible. (T. 59).

The listening post in Fulton County contained three different pieces of equipment: the control unit, a computerized pen register and a tape recorder. The 105 control unit was attached electronically through the telephone line and the telephone switchboard to the 101-A inductor coil and electronically activated the 101-A. (T. 40). A 110 dialed number decoder or pen register, which records only "the outgoing telephone number . . . the time and date that the telephone is taken off the hook, and

the time and date of incoming calls," was electronically connected to the 105 control unit. (T. 41). This 110 is essentially a computerized pen register which was located at the listening post. The final piece of equipment, the tape recorder, was connected to the 110. This piece of equipment specifically records the communication. In this sequence of equipment, oral communications cannot be heard until the tape recorder is turned on. Absent the tape recorder, the equipment constitutes only a pen register. (T. 43). All of the equipment except for the 101-A inductor coil was always located within the Atlanta Judicial Circuit in Fulton County.

The trial court overruled the motion to suppress and specifically concluded that the district attorney of the Atlanta Judicial Circuit was authorized to apply for and the Superior Court of the Atlanta Judicial Circuit was authorized to issue the investigation warrants in the case. In so finding, the trial court concluded that the "device" was located and the interceptions occurred in Fulton County.

It is recognized that the issue in question involves not only state statutes, but also the requirements of Title III of the Omnibus Crime Control and Safe Streets Act. The requirements of both state and federal law must be complied with where applicable.

18 U.S.C. § 2516(2), the Omnibus Crime Control and Safe Streets Act provides the following:

> The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the

> applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling. . . .

This section also provides that a judge may enter an ex parte order authorizing the interception of wire or oral communications "within the territorial jurisdiction of the court

in which the judge is sitting." 18 U.S.C. § 2518(3). The word "intercept" is defined under the statute to mean "the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device." 18 U.S.C. § 2510(4). Thus, a reading of 18 U.S.C. § 2518(3), substituting the above definition of "intercept," reveals that this code section provides that a judge may enter an order authorizing the aural acquisition of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting. As noted by the Supreme Court of Georgia, "it is undisputed the only aural acquisition of the defendant's communications

occurred in the Atlanta Judicial Circuit (Fulton County) where the judge authorizing the investigative warrants was sitting." Evans v. State, supra, 252 Ga. at 316. Thus, it is clear that under federal law, the issuance of the warrants was authorized by the superior court judge of Fulton County.

Under State law, Georgia law does not refer to a place of interception, but a place where the "device" is physically placed. O.C.G.A. § 16-11-64(b) specifically provides the following:

> [U]pon written application, under oath, of the district attorney of the circuit wherein the device is to be physically placed . . . any

> judge of the superior court of the circuit aforesaid may issue an investigation warrant permitting the use of devices, as defined by Code Section 16-11-60 for the surveillance of such person or place. . . .

The code also specifically defines the word "device" as "an instrument or apparatus used for overhearing, recording, intercepting, or transmitting sounds . . . and which involves in its operation electricity [or] electronics. . . ." O.C.G.A. § 16-11-60(1). The issue in question then becomes which of the particular pieces of equipment concerned constitutes a "device" under this statute.

The Petitioners have urged previously that the inductor coil constitutes a wiretap "device" under this code section which was physically placed outside the Atlanta Judicial Circuit. The state has consistently asserted that this piece of equipment alone cannot constitute the device contemplated in the code section. The inductor coil, i.e., the 101-A, is merely a coil which transmits electrical impulses. These impulses are indecipherable without the 105 control unit and the 110 DNR to which the 101-A is electronically connected. The 105 control unit activates the 101-A, i.e., the inductor coil. The 110 DNR converts the electrical impulses into a digital readout of information. This set of

interrelated equipment constitutes nothing more than a pen register. A pen register is governed by neither the federal nor state wiretap laws. See Smith v. Maryland, 422 U.S. 935 (1979); Little v. State, 157 Ga. App. 462, 278 S.E.2d 17 (1981).

The only way that the set of equipment comes within the purview of either the state or federal statutes is by the addition of a tape recorder. The addition of the tape recorder adds an element to the surveillance equipment which is the essential focus of the legislative intent behind the state and federal statutes, that is, the ability to intercept and interpret aural communications. It is clear from a reading of the statutes and the

history that both state and federal statutes show a clear intention to include as devices only equipment which allows for the interception of aural communication.

Respondent submits that the evidence clearly shows that the wire communcations were intercepted in Fulton County by the use of the tape recorder. Any invasion of privacy which the statutes in question were enacted to control, occurred in Fulton County at the point of the connection of the tape recorder. The other equipment utilized by the law enforcement officers was simply a pen register device not subject to control by either statutes. Thus, as the interception occurred in and the device was employed in Fulton County,

the district attorney for the Atlanta Judicial Circuit and the Superior Court of Fulton County were authorized to apply for and had jurisdiction to issue the warrants in question.

Petitioners have asserted in the lower courts that the "device" as defined in the state statute is the 101-A and that jurisdiction should be in the circuit in which that particular piece of equipment is located. The inductor coil is placed in a junction box where there are two sets of wires, one from the subject telephone and one from the leased line. The junction box is installed by the telephone company, not by the state. Furthermore, the junction box may not be the only location where a 101-A may be employed as the piece of

equipment can often be employed in two or three different locations depending upon the wiring arrangements utilized by the telephone company. Thus, to refer to the 101-A as the piece of equipment that establishes jurisdiction, is essentially to confer the designation of jurisdiction to the Southern Bell Telephone Company.

As concluded by the Supreme Court of Georgia, "the inductor coil involved here was not a device used to overhear, record or intercept defendant's conversations. . . The coil was a device to prevent detection of those devices being used to overhear and record defendants' conversations, which devices were physically located in Fulton County." Evans v. State, 252 Ga. at 318.

Petitioners have relied upon several cases in their brief, including United States v. Giordano, 416 U.S. 505 (1974). Respondent submits that the decision in that case does not support the position taken by the Petitioners. To make this conclusion, the courts would again place the state in the position of having the telephone company determine through the wiring arrangements who has the authority to apply for and issue warrants for electronic surveillance. Thus, the location of the 101-A cannot be relied upon for the determination of jurisdiction in order to enforce any policy considerations supposedly set forth in Giordano because there is no necessary

given geographical or jurisdictional area.

There are only two fixed points which bear any rational relationship to the policy considerations that are discussed and implemented through Title III of thr Omnibus Crime Control and Safe Streets Act of 1968 and of the Georgia statute. Those two points are the point where the officers are listening to the surveilled conversations and the point where the subject is engaging in the surveilled conversations. The Petitioners themselves have never contended that the surveilled telephone is the "device" or the point of interception. Furthermore, under 18 U.S.C. § 2510(5)(1), such equipment is excluded as being a "device."

Thus, under state and federal law there is only one location that can be identified as a jurisdictional point, that is, the point where the oral communication is intercepted aurally by the officers. This is the point where the tape recorder receives the electronic impulses and converts those impulses into sound. Placing jurisdiction at any other point is inconsistent both with the policy interests identified and with the statutory placement of jurisdiction.

Respondent submits that this Court should conclude as did the Supreme Court of Georgia that the warrants issued in the instant case were within the authority and jurisdiction of both the district attorney's office of the Atlanta Judicial Circuit and the

Superior Court of Fulton County. Therefore, as both the state and federal statutory requirements were met in the instant case, no constitutional question exists justifying review by this Court.

CONCLUSION

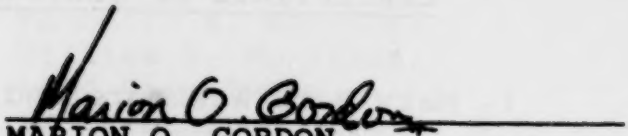
For all of the above and foregoing reasons, Respondent respectfully requests that this Court deny the petition for a writ of certiorari filed on behalf of the Petitioners.

Respectfully submitted,

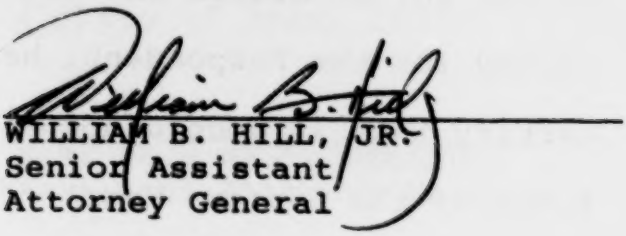
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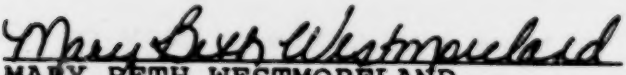
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CERTIFICATE OF SERVICE

I, Mary Beth Westmoreland, a member of the Bar of the Supreme Court of the United States and counsel of record for the Respondent, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon counsel for the Petitioners by depositing a copy of same in the United States mail with proper address and adequate postage to:

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This 13th day of July, 1984.

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